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No. 86-932

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1986

JEFFREY SCOTT NIELSEN,

Petitioner,

vs.

THE STATE OF UTAH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF UTAH

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR THE STATE OF UTAH, RESPONDENT.

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UTAH, RESPONDENT.

STATEMENT OF THE CASE

On April 30, 1983, a confidential informant provided information to Lieutenant Blair, a Logan, Utah

police officer, concerning a large quantity of cocaine he had observed the previous day at Petitioner Jeffrey Scott Nielsen's residence in Brigham City, Utah (R. 84, 108).[1] Blair immediately forwarded the information to Detective Howard, a Brigham City police officer, and detailed facts concerning the informant's known reliability (R. 84, Tr. 29).

Within the hour, Detective Howard, who was in charge of the investigation (Tr. 27, 46), filled out a stock affidavit form for a search warrant detailing the information he had

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[1] "R" refers to the record of pleadings filed in the Utah Supreme Court for petitioner's direct appeal. "Tr" applies to the transcript of the trial. "S" applies to the motion to suppress hearing.

received from Officer Blair. However, he failed to modify the stock language in the form to reflect that fellow officer Blair, rather than he, was the source of the information from the informant and was the one who attested to the informant's reliability (R. 7-9). See Stock Affidavit at Appendix A. The affidavit thus read as if Howard personally received the information from the informant and personally attested to the details concerning the

informant's reliability.[2] All information in the affidavit otherwise accurately reflected the information Blair had provided to Howard, to wit the underlying facts supporting probable cause for issuance of a search warrant.

A search warrant was issued and executed (Tr. 33). Nielsen was arrested after the search revealed 17.5 grams of cocaine in his possession.

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[2] At the preliminary hearing, Detective Howard apparently indicated at some point that he knew the informant. However, the preliminary hearing transcript was not part of the record on direct appeal, and Detective Howard's trial testimony on this point is not totally clear. The context of the questioning and testimony at preliminary hearing is not known (Tr. 25-27). In any event, the record does not support the Utah Supreme Court's or Petitioner's characterization that Howard repeated the statements contained in the search warrant affidavit at the preliminary hearing.

Prior to trial, the prosecutor discovered the errors in the search warrant affidavit, and notified the defense (R. 83). Relying on Franks v. Delaware, 438 U.S. 154 (1978), Nielsen moved to quash the search warrant and suppress the seized evidence (R. 89). Nielsen made only conclusory allegations in his motion and at the suppression hearing that the errors in the affidavit were made intentionally, knowingly or with reckless disregard for the truth. He neither proffered any evidence to support these allegations (R. 93-99; S. 3-7, 17), nor sought an evidentiary hearing on the matter. He took the position that because the State had conceded the statements in the affidavit were false,

he had met his burden. The State, on the other hand noted defendant's total lack of a proffer as to the officer's scienter, and asserted that Officer Howard, knowing search warrants may be based upon hearsay, was only negligent in filling out the blanks on the form, having no purpose to mislead the magistrate into issuing a warrant which he otherwise would not have issued (R. 93, 173; S. 7, 14, 17, 21). No evidence was offered by the parties at the suppression hearing, and the record thus fails to disclose why Detective Howard completed the affidavit form the

way he did.[3] The defense also failed to pursue the matter during Detective Howard's testimony at trial (T. 6-35). Petitioner also made no effort to assert or establish that the errors materially effected the magistrate's probable cause determination. The suppression motion was denied (S. 33), and the evidence was admitted at trial. Petitioner was subsequently convicted of possession of a controlled substance with intent to distribute for value (Tr. 191).

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[3] Cf. People v. Stewart, 105 Ill.2d 22, 85 Ill. Dec. 241, 473 N.E. 2d 840 (1984) (defendant failed to carry his burden of proof as he did not call the affiant and determine what prompted him to use the words he did in the affidavit).

On direct appeal, the Utah Supreme Court affirmed the conviction in State v. Nielsen, ___ P.2d ___, 43 Utah Adv. Rep. 13 (Utah 1986). The court conducted its own review of the record and concluded that the officer's misstatements were intentional and knowingly made in bad faith citing Franks (App. A of Petition at 18, 28). It then recognized that in Franks the remedy was to delete the false statements and then assess whether the affidavit would still support a finding of probable cause. However, because the misstatements in this case occurred due to information which had been omitted, the court followed the line of "omission" cases which have construed Franks as allowing insertion of any

omitted information followed by assessment whether the probable cause determination would have been materially affected had the magistrate known the omitted facts (Id. at 25-26). Under this rationale, the court found under the facts of this case that the misstatements were immaterial to the probable cause determination, especially given the presumption that law enforcement officers will be truthful in their communications with each other, citing United States v. Ventresca, 380 U.S. 102, 111 (1965) (App. A of Pet. at 29-32). Thus, under Franks, the warrant could stand.

REASONS FOR DENYING THE WRIT

Certiorari review of this case is not warranted for several

reasons. First, given the factual and procedural posture of this case (which is far more extensive than presented in the petition), the issues raised in the petition need not be reached. Under Franks, a defendant must make:

> a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

438 U.S. at 155-56. At any hearing, the defendant then carries the burden of establishing such by a preponderance of the evidence. Id. Petitioner's failure below to proffer any substantial evidence to support his conclusory

allegations that Officer Howard's statements were made intentionally, knowingly or with reckless disregard for the truth, and petitioner's failure to even seek a hearing in the trial court in which he might attempt to sustain his burden of proof under Franks obviate the need for this Court to determine whether the Utah Supreme Court's alternate treatment of this case "decided a federal question in a way in conflict with applicable decisions of this Court." S. Ct. Rule 17c.

Although the state supreme court made its own assessment of the record as to the officer's scienter, and did not address petitioner's failure to meet his burden in the trial court,

respondent is not precluded from asserting any matter in the record in support of the judgment below. Blum v. Bacon, 457 U.S. 132, 137 n. 5 (1982). See also Dayton Board of Education v. Brinkman, 433 U.S. 406, 419 (1977) (respondent may urge any argument in support of judgment in his favor, including contentions either rejected or not passed upon by the court below); United States v. New York Telephone Co., 434 U.S. 159, 166 n. 8 (1977) (prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted); and R. Stern and E. Gressman, Supreme Court Practice, 386, 391 (6th ed. 1986). Because this case turns on the

procedural holding of Franks, this Court need not determine whether the reasoning of the lower court was correct as to other aspects of Franks.

Second, because the judgment below is sustainable on the alternate procedural ground just discussed, this case loses any national significance. It will turn on its own facts, and thus affect few other litigants because most will have followed the procedural requisites of Franks. Moreover, tne procedural issue as to a defendant's burden of proof is clearly a narrow one which was conclusively resolved in Franks and need not be revisited.

Third, this case presents the unique situation where the misstatements or omissions by the arfiant did

not directly relate to facts essential to the probable cause determination (e.g.s. the information from the confidental informant and the details relating to the informant's reliability). They merely related to whether the officer was speaking from personal knowledge or was providing information received from a fellow officer (which, under the law, is presumed reliable, United States v. Ventresca, 380 U.S. 102 (1965), and is hearsay which can be used to establish probable cause, United States v. Harris, 403 U.S. 573, 580-81 (1971)). In other words, the misstatements were not designed to bolster the probable cause present in this case, or to hide other facts which might weaken the showing of probable

cause. Officer Howard simply had nothing to gain by the misstatements or omissions. He made the mistake of not reading the stock form carefully enough. There was no evidence of devious police motive designed to deceive the magistrate. This is obviously not the usual scenario in which a Franks issue surfaces, and it is one not likely to recur. Indeed, the justices below and this writer could locate no case with identical facts and only two with somewhat analogous facts. United States v. Davis, 714 F.2d 896 (9th Cir. 1983); United States v. Kirk, 781 F.2d 1498,

1503-05 (11th Cir. 1986).[4] Thus, the narrow facts presented in this case have not been fully explored among the jurisdictions. This Court should await further delineation and illumination of the issue by other circuits and thereby obtain the benefit of a variety of views before accepting certiorari on the issue. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-18 (1950)

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[4] Franks is not totally on point in that the defendant claimed (1) that certain individuals were not interviewed by the affiant officers as alleged in the affidavits, but might have talked to another police officer and (2) that information given to that officer was "somewhat different" from what was recited in the affidavit. 438 U.S. at 158. Moreover, the central issue in Franks was whether defendant was entitled to a hearing to establish his claims, and did not focus on possible distinctions between the two claims made.

(Frankfurter, J., dissenting from denial of certiorari).

Finally, beyond the question of the procedural deficiency noted above, the lower court's application of Frank's to the facts of this case was correct and produced a fair result. The court was faced with a situation (1) where the misstatements or omissions were not the design of an affiant attempting to bolster his chances of establishing probable cause; (2) where all or the critical facts were supplied relating to the informant's information and reliability, and there was no allegation that these facts were

inaccurate;[5] (3) where warrants may issue upon hearsay between police officers under the general rule that officers are presumed to give each other reliable information; (4) where the probable cause determination clearly would have been the same had the omitted information been known; and (5) where the court viewed the affiant as having intentionally and knowingly made the misstatements or omissions. Under these circumstances, the court focused on the materiality prong of Franks, 438 U.S. at 156, and found that because the alleged false statements

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[5] Cf. Whiteley v. Warden, 401 U.S. 560 (1971) second officer entitled to act on information from first officer, but if underlying facts are insufficient or inaccurate to establish probable cause, the evidence must be excluded).

were not necessary to the finding of probable cause, they were not material and the search warrant need not be voided or the fruits of the search excluded. The court viewed the case as more akin to an affiant's failure to supply complete information (an omission), rather than an affirmative act of supplying misinformation to establish probable cause (the situation in Franks). (App. A of Pet. at 25-26). In cases where a misstatement occurs because information is omitted, the courts and commentators have widely recognized that the remedy suggested in Franks, of deleting false material and assessing the affidavit's remaining content for probable cause, does not apply. Rather, the omitted material

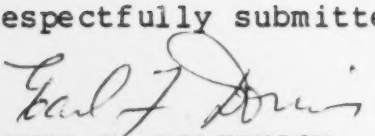
should be inserted and the affidavit evaluated to determine if it will still support a finding of probable cause. See cases enumerated in the opinion below (App. A of Pet. at 25-26) and 2 W. LaFave, Search and Seizure, § 4.4(b) at 194-95 n. 43 (2nd ed. 1987), and cases cited thereunder. The court correctly assessed that the purpose of Franks was to preclude affiants from deceiving magistrates into finding probable cause. Because that situation was not present here, it properly chose not to rigidly apply the process suggested in Franks of deleting the misstatements. Such an approach would have resulted in the senseless deletion of the underlying information obtained from the reliable informant and of

which the magistrate was fully aware. The preferred approach was to add the omitted information as to the identity of the officer who initially obtained the information from the informant and who attested to his reliability, and then reassess whether probable cause was still present. Given the unique facts of this case, this analysis was appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1987, forty copies of the Brief In Response To Petition Of Writ Of Certiorari For The State Of Utah Respondents were mailed, postage prepaid to the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C 20543 and three copies were mailed to Kenneth R. Brown, 10 West 300 South, Suite 500, Salt Lake City, Utah 84101.

I further certify that all parties required to be served have been served.

Earl F. Dorius

EARL F. DORIUS

Dana Miller Cook

NOTARY PUBLIC, Residing
In Salt Lake County,
State of Utah

Subscribed and sworn to before me this 24th day of February, 1987.

My Commission Expires: 5-16-89

APPENDIX "A"

IN THE FIRST CIRCUIT COURT OF BRIGHAM CITY
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH)
) ss
COUNTY OF BOX ELDER)

DEPOSITION AND AFFIDAVIT OF

IN SUPPORT OF AND PETITION FOR SEARCH WARRANT

Personally appeared before me this 30th day of April, 19 83, the deponent and affiant herein, Arrold Howard, a Peace Officer, who, on oath, deposes and says that he has and there is probable and reasonable cause to believe, and that he does believe, that there is now (on the premises) (in a vehicle) (on the person of) located at and also described as: A single family dwelling located at 371 Wildwood drive Brigham City Utah. Also a vehicle barring the license plate Utah personalized "SKYDIVE"

the following personal property or evidence, to wit: Approximately one-half pound of Cocaine.

Your deponent and affiant says that there is probable and reasonable cause to believe that the said property or evidence:

(X) is unlawfully acquired or unlawfully possessed.
( ) has been used as a means of committing a public offense.
( ) is being possessed with the purpose to use it as a means of committing or concealing a public offense.
( ) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct.
( ) consists of an item or constitutes evidence of illegal conduct, possessed by a person or entity not a party to the illegal conduct.

Your affiant says that the facts in support of the issuance of the Search Warrant are as follow:

Your affiant has been a Police Officer for the past 13 years, employed in such capacity by the Box Elder & Brigham City, and has acted and received the information set forth in this affidavit in that capacity.

Number .....
FILED MAY 24 1983
By .....

BEST AVA

(USE AFFIDAVIT PAGE 2-b ONLY WHEN CONFIDENTIAL AND RELIABLE INFORMANT IS BEING UTILIZED BY AFFIANT.)

On the 30 day of April, 19 83, at approximately 1:00 (AM.) (p.m.), your affiant, Harold Bowers, to wit: Confidential Informant, received information from Informant No. 1, a confidential informant whom your affiant considers to be reliable. This belief is founded upon your affiant's past experience with the informant. This belief is also founded upon the information presently received from this informant when considered and evaluated in the context of all of the facts and circumstances set forth in this affidavit. In the past this informant has given to your affiant information on four separate occasions that: led to the arrest and conviction of a person concealing thirty pounds of Hash. Also the arrest of another person who was concealing 1-4 oz. of Cocaine; & also $16,000.00. Confidential Informant has given information that has been confirmed by affiant and found to be true and correct, resulting in the investigation of conspiracy presently being conducted.

Your affiant has verified this information to be correct and accurate.

The information received from this informant has resulted in One arrests being made of three persons; the information has resulted in Three persons being held to answer at the conclusion of felony preliminary hearings; and the information has resulted in One persons being convicted.

Your affiant desires to keep the identity of the said informant secret and confidential because your affiant believes that the disclosure of the said informant's identity would endanger the informant's safety and well-being, to wit: That disclosing this identity would terminate investigations presently going on.

Your affiant states that the said confidential reliable informant did speak with personal knowledge when imparting the information hereinafter set forth, unless and except where specifically stated to be otherwise.

Your affiant was informed by the said confidential reliable informant on the aforementioned date that A subject by the name of Scott Nelson who resides at 171 Wildwood Drive Brigham City, Utah is in possession of approximately one-half pound of Cocaine; value estimated at $16,000.00.

ILABLE COPY

Your affiant has reasonable cause to believe that grounds for the issuance of a Search Warrant exist, based upon the aforementioned information, facts and circumstances.

WHEREFORE, your affiant prays that a Search Warrant be issued for the seizure of said items in the day time and that the same be brought before this Magistrate.

WHEREFORE, your affiant prays that a Search Warrant be issued for the seizure of said items at any time of day or night and that the same be brought before this Magistrate. There is reasonable cause to believe that a search is necessary in the night time for the purpose of seizing the property described herein because: The evidence may be destroyed or further distributed.

It is further requested that, if appropriate, the officer executing the requested Warrant not be required to give notice of his authority or purpose because:

- ( ) This paragraph is not appropriate to this case and such authority is not requested.
- (X) The property sought is a narcotic, illegal drug, or other similar substance which may be easily and quickly destroyed or disposed of.
- ( ) Physical harm may result to a person if such notice is given because:

Affiant

Subscribed and sworn to before me this 30 day of April, 1993.

Judge

In the 1st Circuit Court of Box Elder County, State of Utah.